F S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2007
v	No. 265534 Midland Circuit Court
WILLIAM HOWARD RYAL Defendant-Appellant.	LC Nos. 04-001933-FC 04-002137-FC

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Following a consolidated trial, a jury convicted defendant of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age), and three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years of age). The trial court sentenced defendant to concurrent prison terms of 12 to 30 years for each CSC I conviction and 10 to 15 years for each CSC II conviction. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

On January 30, 2004, in case No. 04-001933-FC, defendant was charged with CSC I and CSC II counts that allegedly occurred against a complainant born on 11/9/88, (complainant "A") on or about 1993 through 1997. Defendant waived his right to a preliminary examination concerning these counts and was bound over for trial. On June 4, 2004, in case No. 04-002137-FC, defendant was charged with two counts of CSC I that allegedly occurred against the complainant born on 3/8/84, (complainant "B") on or about March 8, 1996. During the October 25, 2004 preliminary examination in case No. 04-002137-FC, plaintiff stated that following the close of proofs that day, he intended to move to amend the dates of the offense alleged in the complaint from March 8, 1996 to March 1995 through March 1996. Plaintiff also intended to move to add two new counts of CSC II. Defense counsel replied that he was entitled to notice concerning the amended dates but that he "would leave that within the discretion of the Court whether to let them amend."

Complainant A testified that she was living with her mother, her siblings, and defendant, her former stepfather, from March 1995 through March 1996. She recalled defendant touching her sexually about 15 times when she was between 11 and 12 years old. On one occasion during that time, she testified that after she removed her clothing, defendant kissed and fondled her breasts and digitally penetrated her vagina. On another occasion during that time, defendant fondled her breasts underneath her bra and digitally penetrated her vagina. After the closing of

proofs, plaintiff moved to amend the dates of the complaint to on or about 1995 through 1996 and to add two new counts of CSC II. Defense counsel did not address the motion to amend the dates of the offenses. The district court bound defendant over on all four counts and granted plaintiff's motion to amend, concluding that defendant would not be prejudiced.

On September 9, 2004, in case No. 04-001933-FC, plaintiff filed a notice of intent to offer testimony under MRE 404(b). On November 9, 2004, plaintiff moved, in both actions, to consolidate the two actions for trial and, in case No. 04-002137-FC, filed a notice of intent to offer testimony under MRE 404(b). Both notices of intent are identical and provide that evidence "will concern other incidents of sexual contact and/or penetration involving defendant and his other step-daughter" and would be offered to establish "motive, opportunity, intent, scheme, plan, or system in doing an act, and/or the absence of mistake or accident in committing the charged offenses". On December 13, 2004, the parties stipulated to consolidate the actions for trial.

During trial, defense counsel argued that the complainants had contrived the allegations against defendant. Following approximately two days of deliberations, the jury found the defendant guilty of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age), and three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years of age). Following imposition of sentences by the trial court this appeal ensued.

Defendant argues that his trial counsel was ineffective and thus he was denied a fair trial. Defendant first alleges that trial counsel should have challenged the MRE 404(b) notice as improper and that certain bad acts evidence should not have been admitted. An ineffective assistance of counsel claim is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A judge must make factual findings and then decide whether those facts amount to a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Constitutional error warranting reversal does not exist unless counsel's error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993); *People v Pickens*, 446 Mich 298, 312 n 12; 521 NW2d 797 (1994). To establish a claim of ineffective assistance of counsel, a defendant bears a heavy burden. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Specifically, a defendant must show that counsel's performance was objectively unreasonable and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Id.* at 600. In addition, there is a strong presumption that defense counsel's performance was sound trial strategy. *Id.*

Under MRE 404(b), our Supreme Court has articulated a four-part test for admitting other acts evidence: (1) the evidence is offered for a proper purpose rather than to prove the defendant's character or propensity to commit the crime, (2) the evidence is relevant to an issue or fact of consequence at trial, (3) the evidence is not unduly prejudicial under the balancing test of MRE 403, and (4) the trial court may, upon request, provide a limiting instruction to the jury. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The prosecutor bears the burden of articulating a noncharacter purpose for admitting the evidence. *People v Crawford*, 458 Mich 376, 385-386; 582 NW2d 785 (1998).

Generally, a prosecutor must provide reasonable notice of an intent to present other acts evidence:

> The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale . . . for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination. [MRE 404(b)(2).]

If the prosecution did not provide effective notice, a court must determine whether the evidence was nevertheless admissible, and, if so, if it had a significant effect on the proceeding. *People v Hawkins*, 245 Mich App 439, 453-456; 628 NW2d 105 (2001).

As to the MRE 404(b) notice, while inadequate under *Crawford* because it was nothing more than a mere recitation of the enumerated potential proper purposes under MRE 404(b), plaintiff has met its burden in showing that some of the instances of sexual assault were admissible because they involved a common scheme. Moreover, by electing not to request a proper limiting instruction as to what assaults could be used to show a common scheme and as to what assaults could be used as substantive evidence of guilt, defense counsel may have wanted to keep the jury from knowing that the sexual assaults were to be considered as a common scheme involving both the complainants. To infer to the jury that certain instances were part of a devious plan could have been devastating for defendant and swayed the jury. Rather, defense counsel chose to focus on discrediting the witnesses when he continued to ask them about certain specifics concerning the assaults that they were unable to answer. This Court will not use hindsight in determining whether a strategy should have been taken. *People v Rice* (*On Remand*), 235 Mich App 429, 444-445; 597 NW2d 843 (1999).

Defendant next argues that trial counsel should not have resisted plaintiff's motion to amend the dates of the assaults concerning one of the consolidated actions. While the trial court may have effectively amended the information when the court instructed that plaintiff must prove beyond a reasonable doubt that the crimes occurred during 1993 through 1997, cf. *People v Stricklin*, 162 Mich App 623, 632-633; 413 NW2d 457 (1987), defendant has failed to show that the actions would have been defended differently. Moreover, defendant was fully aware of the nature of the charges against him in both actions and the dates at which the complainants alleged they occurred and should have been able to prepare a defense.

Defendant next argues that his trial counsel should not have stipulated to consolidate these actions for trial. However, at that time, the consolidation was not forbidden by MCR 6.120,[1] and defense counsel apparently made a strategic decision to join the actions and attempt to show the jury that neither complainant could be believed. Again, this Court will not second-guess trial strategy. *Rice*, *supra* at 445.

[1] MCR 6.120 was amended, effective January 1, 2006, after the trial in this case.

Defendant next argues that his trial counsel's opening statement was prejudicial and even helpful to plaintiff. In summarizing appellate counsel's motion for a new trial based on the grounds that defense counsel was ineffective the trial court made the following observations:

> I found the introductory opening statement unusual, at least in the sense that the communication that the jury received is that the defense attorney's sole role was to: "Pick holes in the prosecutor's case." It was remarkable in the sense that it was also, at best, a passive defense. There wasn't a single evidentiary objection rendered. And there was testimony that in the Court's judgment should not have been introduced, at least in the sense that it was objectionable. It may well have been a trial strategy. And I can certainly offer a justification in support of that, which is that the -- given the fact that the defendant was facing two witnesses, that the best course at that point was not to appear objectionable, but to limit the defense to that fact that the declarants themselves were simply not believable. It nevertheless was remarkable from the standpoint of the Court, and the fact that I may have an opportunity to observe some 25 to 30 cases a year, it was a passive and unusual defense.

We concur with the observations and findings of the trial court. Defense counsel's opening statement was "unusual," but having found that, we cannot state that the opening statement was prejudicial. While we concur that the defense offered in this case was both "passive" and "unusual" we cannot find that it failed to meet the minimum standards as set forth by our Supreme Court. Additionally we cannot find that the necessary prejudice arose from this "passive" and "unusual" defense such that an otherwise innocent person was wrongly convicted. Thus, while we, like the trial court, have questions about the way trial counsel approached this case, we cannot find that the defense was "objectively unreasonable and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different." *Carbin, supra.*

Defendant next argues that trial counsel should have objected to a number of leading questions that occurred throughout trial. "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." MRE 611(c)(1). The amount of leading questions put forth by the prosecution is somewhat daunting and thereby troublesome. Given the number of leading questions posed by the prosecution, there were occasions where we must state that defense counsel should have objected. However, we concur with the findings of the trial court that part of counsel's strategy was to not portray himself as an obstructionist. His strategy was to undermine the credibility of the complaining witnesses and posture himself as someone who was credible by not posting numerous objections to the numerous leading questions. While we may find this strategy to be both passive and unusual, this Court will not, and cannot second-guess trial strategy. *Rice, supra* at 445.

Defendant next argues that the assistant prosecutor improperly elicited testimony that amounted to improper vouching for the complainants and the assistant prosecutor improperly vouched for the complainants during closing argument. A lay witness may not give an opinion on the believability of the complainant's allegations, *People v Smith*, 425 Mich 98, 113; 387 NW2d 814 (1986), because the jury has the sole authority to determine whether a particular witness was credible, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Further, a witness is not permitted to comment on the credibility of another witness. *Id.* Although a

prosecutor may not vouch for witnesses' credibility by implying that he or she has some special knowledge of their truthfulness, the prosecutor may comment on his or her own witnesses' credibility, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). The testimony complained of came from the investigating officer, Detective Stark. However, reviewing his testimony as a whole, we cannot find that the detective vouched for the credibility of either of the complainants, or that he gave his opinion as to whether he believed the allegations, or that he stated that he was trained to determine whether an individual was telling the truth. In fact, Detective Stark stated, "whether they're telling the truth or lying is ultimately up to the jury or the Judge. Mine is only to gather the facts as they give them to me. And if I am insightful enough to find any discrepancies, then, of course, those are going to be challenged during the interview". None of defendant's claims in regard to what was stated is evident in the record. As to the assistant prosecutor's closing argument, she stated that Detective Stark had testified that there was no indication that complainant A was seeking attention and that complainant B had changed her initial testimony. This was not improper because a prosecutor may comment on the credibility of a complainant. *Thomas*, *supra* at 260.

Defendant next argues that numerous instances of improper hearsay were elicited during trial. However, defendant presents little meaningful analysis of why the challenged testimony allegedly constitutes inadmissible hearsay. Thus, defendant has abandoned these hearsay claims by failing to meaningfully argue their merits. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.").

Defendant next argues that in light of the charges and impending length of sentence upon a conviction, trial counsel should have recommended to defendant to accept the plea of a misdemeanor.

> The decision to plead guilty is the defendant's, to be made after consultation with counsel and after counsel has explained the matter to the extent reasonably necessary to permit the client to make an informed decision. See MRPC 1.2(a) and MRPC 1.4(b). While an attorney may elect to offer a client a specific recommendation whether to go to trial or to plead guilty in the course of that consultation, we decline to hold that such a recommendation is required or that the failure to provide such a recommendation necessarily constitutes ineffective assistance of counsel. The test is whether the attorney's assistance enabled the defendant to make an informed and voluntary choice between trial and a guilty plea. Absent unusual circumstances, where a counsel has adequately apprised a defendant of the nature of the charges and the consequences of a plea, an informed and voluntary choice whether to plead guilty or go to trial can be made by the defendant without a specific recommendation from counsel. [*People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995).]

Defendant stated that during the second day of deliberations, the assistant prosecutor offered a plea of a misdemeanor in exchange for dropping the charges against him. There appears to be no question that this offer was made. However, defendant has failed to meet his burden because he was undoubtedly aware of the possible consequences of not accepting the plea

and acknowledged that the plea agreement meant that he would likely have to serve the entire year in jail. While defendant stated that his trial counsel made no recommendation, there is no ineffective assistance because defendant was aware of the charges and the plea consequences. *Id*. The record does not indicate that there were any unusual circumstances that would have required defendant's counsel to specifically advise him to plead guilty. Accordingly, defendant has failed to meet his heavy burden.

Defendant argues that in scoring both PRV 7 and OV 13, his due process rights were violated because this amounted to defendant being punished twice for the same conduct. A question of constitutional law is reviewed de novo. *LeBlanc, supra* at 579. The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature, and the Legislature is presumed to have intended the meaning it plainly expressed. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 15; 697 NW2d 913 (2005). If statutory language is clear and unambiguous, then a court is required to apply the statute as written. *Id.*

Where the sentencing guidelines variables are directed at different purposes, a trial court's assessment of points under both variables for the same facts is proper. *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676 (1996). In that regard, while OV 13 assesses points for a pattern of criminal activity, PRV 7 assesses points for subsequent and concurrent felony convictions regardless of whether the convictions demonstrate a pattern. Accordingly, no due process violation occurred when the trial court assessed points under both variables.

Defendant relies on *United States v Romano*, 970 F2d 164 (CA 6, 1992), abrogation acknowledged in *United States v Cobleigh*, 75 F3d 242, 251 (CA 6, 1996),[2] for the proposition that the trial court improperly double counted PRV 7 at 20 points and OV 13 at 50 points. However, *Romano* is distinguishable because that decision was based on the purpose for scoring variables under those distinct federal sentencing guideline variables. See *id*. In regard to the variables in issue here, it is clear that the Legislature established the variables for distinct purposes.

Primarily relying on the rule pronounced in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and reiterated in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), defendant argues that he is entitled to resentencing because the trial court violated his due process rights when scoring points for a number of variables by considering facts that were neither proved beyond a reasonable doubt at trial nor admitted by defendant. However, in *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006), our Supreme Court held that the rule of *Blakely* does not apply to Michigan's legislative sentencing guidelines. Thus, we must reject defendant's argument based on the *Blakely* rule.

[2] The *Cobleigh* Court concluded that the decision had been abrogated based on an amendment to the relevant guidelines. *Cobleigh, supra* at 251.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello

I concur in the conclusion that the trial court's determination should not be disturbed.

/s/ Helene N. White